

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

EDWARD BINIEK and)	CASE NO. 3:14-1154
MARLA BINIEK,)	
)	(JUDGE MANNION)
Plaintiffs)	
)	
v)	
)	
MARMAXX OPERATING)	
CORPORATION d/b/a TJ MAXX and)	
JOFRAN, INC.,)	
)	
Defendants)	

**PLAINTIFFS' RESPONSE TO DEFENDANT MARMAXX OPERATING
CORPORATION'S MOTION TO PRECLUDE PORTIONS OF THE REPORT OF
DUANE R. FERGUSON, P.E.**

Defendant Marmaxx Operating Corporation ("Marmaxx") has filed a Motion In Limine to Preclude Co-Defendant Jofran Sales, Inc. Expert Duane R. Ferguson, P.E. from offering a speculative opinion that "the physical damage to the chair is inconsistent with it being on the platform when Mr. Biniek sat on it and the chair fell off of the platform edge causing the leg to break off." Plaintiffs agree with Co-Defendant Marmaxx that this proffered fantasy opinion is nothing more than revisionist history by Mr. Ferguson in an effort to completely ignore all factual evidence of record to the contrary that the chair was on the floor at the time Plaintiff-Husband sat on it and when it collapsed.

The bedrock foundational support for Mr. Ferguson's "stretch" opinion is based on Plaintiff testifying at his deposition that he could not recall one way or the other whether the chair was on the platform or the floor at the time his accident occurred. (See Defendant Marmaxx Exhibit B at p. 19).

Aside from ignoring the unequivocal testimony of eyewitnesses to the accident Marla Biniek and her son Edward Biniek, III, that the chair was on the floor at the time Mr. Biniek sat on it when it collapsed. (Defendant Marmaxx Exhibit C at pp. 6-7 and Exhibit C to Plaintiffs' Motion to Preclude Testimony of Defendant Jofran's Expert Duane R. Ferguson, P.E. Docket 38-1), Mr. Ferguson is less than candid with this Court in ignoring other evidence in this case that unquestionably establishes that the chair was in fact on the floor when Plaintiff-Husband sat on it.

Within seconds of Plaintiff-Husband's accident, store associate employee Tara Hughes came to the aid of Mr. Biniek when she heard the chair collapse and provided the following corroborating evidence:

- Q. Do you believe Mr. Biniek sat in the chair while it was on the platform or on the ground?
- A. **DEFINITELY ON THE GROUND** because if it was on the platform he would have hit his head...
- * * * * *
- Q. Other than the fact that he – the way he fell, do you have any other basis for believing the chair was put on the floor?
- A. **OTHER THAN HE TOLD ME SO. HE SAID, ALL I DID WAS TAKE IT OFF I WANTED TO TRY IT OUT AND THERE'S - -**
- * * * * *
- Q. Did you hear him put the chair on the ground?
- A. Yes. (Exhibit A at pp. 44-45).

Further corroborating evidence was the testimony of Defendant Marmaxx Store Manager Mary Lucille Murtha who came to investigate Mr. Biniek's accident immediately after follow employee Tara Hughes had summoned her over.

- Q. When you arrived to the store furniture area, did you ever ask Mr. Biniek what happened?
- A. **YES, WELL, HE, TOLD ME, HE SAID I TOOK THE CHAIR OFF THE PLATFORM AND I SAT DOWN AND THE LEG BROKE OFF ...** (Exhibit B at p. 29).

When Mary Lucille Murtha completed her TJX Accident Report she completed the following:

CUSTOMER'S VERSION OF ACCIDENT: Customer sat in a chair on the sales floor. The right front leg of the chair broke causing the customer to fall to the ground. (Exhibit C).

While an expert is certainly given some latitude in extrapolating from the facts, an expert is not permitted to engage in a self-directed fraudulent fact creating mission substituting his opinions for a version of the facts for which he believes would be most helpful for the defense of the party that retained him. GE v. Joiner, 522 U.S. 136, 146 (1997).

While parties to litigation may have a subjective disagreement over an objective set of facts, our civil justice system is not a vehicle for a party to manipulate the truth. Allowing Mr. Ferguson to testify is tantamount to giving Defendant Jofran a green light to manipulate the truth in this case.

Respectfully submitted,

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By:



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JOFRAN, INC.,)	
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CERTIFICATION OF SERVICE

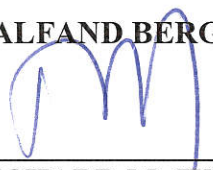
I, Richard M. Jurewicz, Esquire, do hereby certify that service of a true and correct copy of the within PLAINTIFFS' RESPONSE TO DEFENDANT MARMAXX OPERATING CORPORATION'S MOTION TO PRECLUDE PORTIONS OF THE REPORT OF DUANE R. FERGUSON, P.E. was made on September 21st, 2015, Electronic E-Filing upon the following:

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TARA HUGHES
BINIEK vs. MARMAXX OPERATING CORP

October 08, 2014

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

-----X
EDWARD and MARLA BINIEK, : CIVIL ACTION
Plaintiff(s), :
 :
v. :
 :
MARMAXX OPERATING CORP. :
and :
JOFRAN SALES, INC. :
Defendant(s). : NO. 3:14-CV-1154
-----X

- - -
October 8, 2014
- - -

Oral deposition of TARA HUGHES, held
at the LAW OFFICES OF NEIL T. O'DONNELL, 267
Wyoming Avenue, Kingston, Pennsylvania 18704,
beginning at 2:51 p.m., on the above date,
before Denise D. Bach, a Federally Approved
Registered Professional Reporter and Notary
Public.

ESQUIRE DEPOSITION SOLUTIONS
1835 Market Street
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TARA HUGHES
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1 feet, like just a couple steps away from where
2 he was.

3 Q. And then I believe it was your
4 testimony that at that time there were no chairs
5 on the floor, they were on the platforms?

6 A. No. I didn't see it on the floor
7 when I walked past, no.

8 Q. And then three or four steps later
9 is when you heard the sound?

10 A. Yes.

11 Q. Do you believe Mr. Biniek sat in
12 the chair while it was on the platform or on the
13 ground?

14 A. Definitely on the ground. Because
15 if he was on the platform, he would have hit his
16 head. He would have -- because the chairs are
17 always kind of towards the front or the side of
18 the platform, so like you would fall right off
19 the platform also and they're like a lift up.
20 So he would have hit his head. He was -- he
21 wouldn't have fell on his -- on his knees.

22 Q. Other than the fact that he -- the
23 way he fell, do you have any other basis for
24 believing the chair was put on the floor?



TARA HUGHES
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1 A. Other than he told me so. He
2 said, all I did was take it off and I wanted to
3 try it out. And there's --

4 Q. Okay. So do you believe in that
5 three or four steps from when you saw him and
6 there was no chair on the floor until the
7 accident happened, that he had time to take it
8 off the platform, sit it on the ground and then
9 sit down in it and the chair broke?

10 A. Yes, because it was -- it doesn't
11 take that long. They're not that heavy, you
12 just pick it up, put it down, sit. That's it.

13 Q. Did you hear him put the chair
14 down on the ground?

15 A. Yes.

16 Q. Can you describe generally your
17 circumstances for leaving T.J.Maxx's employment?

18 A. And why is that relevant?

19 MR. STOFKO: Jim, do you want to
20 direct her to answer the question?

21 MR. LYNN: I can't direct her to
22 answer the question. I'm not directing her not
23 to answer the question.

24 MR. STOFKO: I'm not going to get



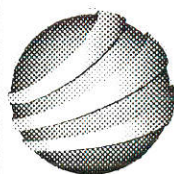
In the Matter Of:

BINIEK vs. MARMAXX OPERATING CORP

3:14-CV-1154

MARY LUCILLE MURTHA

October 08, 2014



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MARY LUCILLE MURTHA
BINIEK vs. MARMAXX OPERATING CORP

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1 A. I saw Tara came over and said, I,
2 you know, I didn't see anything, but I was a few
3 aisles down and I heard a noise. I came over.
4 And Mr. Biniek had already gotten up. And he
5 said, I sat down on the chair and the leg broke.
6 So then she went in turn and paged me.

7 Q. When you arrived to the store
8 furnishing or furniture area, did you ever ask
9 Mr. Biniek what happened?

10 A. Yes. Well, he, he told me, he
11 said, I took the chair off the platform and I
12 sat down and the leg broke off. So, of course,
13 I asked if he was okay. And he said, yeah. He
14 said, I hit my right side and the back of my
15 head when I went down. And at that point, I
16 asked if he wanted me to call -- you know, if he
17 needed anything, if he needed me to call for an
18 ambulance. And he said, no, he was okay. And I
19 said, well, let me take your name and your
20 address and your phone number and, you know, I
21 will call this in.

22 Q. Did you ask either of his children
23 what they saw or what they heard?

24 A. Yes. They told me. They said



TJX Accident Report

Store Name: TJX Companies / TJ Maxx	Reference No: 9640240223
Address: 461 Arcoa Hub Plaza, Wilkes Barre, PA, 18702	Store Location: T0016
	Store Phone No: 570-822-4465

INCIDENT

Date of Incident: 3/11/2013	Time of Incident: 07 : 50 PM
Date of Notice to TJX: 3/11/2013	Individual Notified: Marylou Murtha
Customer's Version of Accident: Customer sat in a chair on the sales floor. The front right leg of the chair broke causing the customer to fall to the ground. He landed on his back, right arm and the back of his head.	
What did you observe? Nothing observed but spoke with the customer after the fact	
If this was a fall, what footwear was the customer wearing? Unknown	
What if anything was the customer carrying? Nothing being carried.	

CUSTOMER INFORMATION

Injured Name & Address:	Biriek, Edward, 121 Maffett St., Wilkes Barre, PA, 18705	Phone: (H) (570)-239-9219 (W) unknown
Property Owner Name & Address:	Unknown	Phone: (H) Unknown (W) Unknown
Age: 15.0	Sex: Male <input checked="" type="checkbox"/> Female <input type="checkbox"/>	Height: 5 ft 9 in Weight: about 170 lbs.
Describe the Property Damaged: Unknown		
Describe the Injury: Unknown injuries to back of head, right arm and back		
Customer to seek Medical treatment	Medical Facility/Doctor Name and Address: USA Phone No.: unknown	
Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> Unknown <input type="checkbox"/>		
Type of Medical Treatment:	First Aid <input type="checkbox"/> Emergency Room <input type="checkbox"/> Medical Doctor <input type="checkbox"/> Other/Unknown <input checked="" type="checkbox"/>	

WITNESSES

Was the Customer Shopping Alone?		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> Unknown <input type="checkbox"/>
First Witness Name and Address: unknown	Home Phone No.: unknown	
Customer <input type="checkbox"/> Employee <input type="checkbox"/>	Work Phone No.: unknown	
Second Witness Name and Address: unknown	Home Phone No.: unknown	
Customer <input type="checkbox"/> Employee <input type="checkbox"/>	Work Phone No.: unknown	

OTHER

Was a photo taken? Note: Please send to HO Risk Management with the customer name & TPA claim # on the back	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
Does the customer need to be contacted?	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
If Yes, Why? Courtesy call	Yes <input type="checkbox"/> No <input type="checkbox"/>
If No, was the situation resolved at the store level?	Yes <input type="checkbox"/> No <input type="checkbox"/>
Was the customer satisfied when they left the store?	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
Any Additional Information?	
REPORTED BY	
Name: Marylou Murtha	Title: Asst. Manager

